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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~994~~ 134

WILLIAM J. SORGEL, EXECUTOR OF THE ESTATE OF WILLIAM R. SORGEL, DECEASED, AND DOROTHY I. FOSTER,
PETITIONERS,

VS.

COMMERCIAL CREDIT CORPORATION,
RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## Brief for Respondent in Opposition

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OCTOBER TERM, 1959.

## No. 994

WILLIAM J. SORGEL, EXECUTOR OF THE ESTATE OF WILLIAM R. SORGEL, DECEASED, AND DOROTHY L. FOSTER,
PETITIONERS,

VS.

COMMERCIAL CREDIT CORPORATION,
RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

# Brief for Respondent in Opposition

### STATEMENT OF THE CASE

Jurisdiction is based upon diversity of citizenship.

In support of its claim and against the defenses of Petitioner Sorgel, as well as the maintenance of the counterclaim, Respondent duly presented a Motion for Directed Verdict and a Motion for Judgment Notwithstanding the Verdict. In overruling these motions and rendering judgment on the minority stockholders' counterclaim, the trial court awarded the whole of this recovery of $24,318.14 to Petitioners personally for their expenses in obtaining such judgment for the benefit of the corporation (R. I, 97-8).

The case in the main is sufficiently stated in the several opinions of the Court of Appeals, 274 Fed. 2d 449-67, 277 Fed. 2d (Petition 1a-42a), as well as in the "history" given in the Petition (5-8) with one exception. That exception is: the Court of Appeals did not remand this cause "for the sole purpose of determining the amount of outstanding accounts receivable that were unpaid so that interest thereon could be computed." Aside from "further proceedings not inconsistent with this opinion", it remanded for the determination of "the amount due as service charges" (Petition 35a, 42a) which "should be figured on the average daily balance of accounts actually 'purchased', or on which Commercial Credit had actually advanced 80% of the face value" (Petition 33a).

The contract guaranteed, by which Commercial Credit agreed to "purchase from Customer" (Howard Corp.) accounts receivable and to "advance to Customer" 80% of the gross face value of such accounts (R. I, 136-7), is identical in terms with the one involved in **Blackford vs. Commercial Credit Corporation**, 263 Fed. 2d 97 (CA—5th, certiorari denied, 361 U.S. 825, 80 S. Ct. 74). Just as in that case, so in this, under the law of the state where finally accepted (Maryland in that, Illinois in this) there is no restriction on the rate of interest that may be agreed upon by a borrowing corporation, nor the guaranty by an individual of a loan to a corporation.*

The written guaranty sued upon (R. I, 138) is sufficiently stated in the Court's opinion (Petition 2a).

The one "substantial issue" on which the case went to trial, as well as the manner in which Respondent "made

*Smith-Hurd's Illinois Statutes, Chapter 74, Sections 4-8, and Chapter 32, Section 6. **Winkle vs. Scott**, 99 Fed. 2d 299 (CCA—8th).

out its prima facie case by introducing its original ledger sheets" (R. III, 649-63), is correctly stated in the opinion (Petition 6a-7a). The same thing is true about the outline of the "three basic efforts to attack the correctness" of Respondent's figures, to-wit: (1) "correctness of basic figures" (Petition 7a-13a), (2) "assignment of accounts for 'credit'" (Petition 13a-20a), and (3) "credit for returned merchandise" (Petition 21a-25a).

The three opinions of the Court of Appeals very much more fairly state the "facts" than does the Petition under that caption (8-11), and the latter requires corrections in several particulars, as presently shown.

First of all, to explain Petitioners' references (9-10) to Respondent's receipt after August 26, 1953, of additional accounts and returned merchandise, the undisputed testimony is that the $46,723.40 in invoiced value of Howard Corp. accounts receivable taken by Commercial Credit after August 26, 1953, were taken only as further security and not in payment (R. II, 410, 338-9, 342). The same thing is true about the $68,445.56 invoiced value of merchandise (R. II, 267, 337, 339, 410, 411, 447; R. III, 527, 630-1, 635; R. IV, 879, 882, 883).

This incredible plea of payment is the principal basis of Petitioner Sorrell's defense and Petitioners' counterclaim and is later discussed (post 22).

By the bottom paragraph on page 10 of the Petition, it is sought to show that Respondent is responsible for the disappearance of $25,794.44 of Howard Corp. merchandise placed in its custody as security. This idea was invented by Petitioners after the original reversal of the case by the Court of Appeals, and is discussed later (post 28).

Petitioners (11) conclude their review of these so-called "facts" with the statement that the basic sum of $41,790.12 consisted principally of the Skillern & Son account of $32,500.52, and the Ward Drug Co. account of $1,409.18, the remainder being the balance on accounts receivable obtained by Commercial Credit after August 26, 1953. None of these statements is borne out by the references to the record given by Petitioners.

We shall have occasion to discuss the Skillern and Ward accounts later (post 17), but the statement that any part of the $46,723.40 of accounts taken after August 26, 1953, as security is included in the basic or principal sum of $41,790.12 found due by the Court (Petition 35a) is absolutely untrue. This is apparent from an examination of Plaintiff's Exhibit 15 (Petition 31, Note 15; R. III, 675-6) which shows that the $41,790.12 is arrived at by taking the "total assigned accounts receivable unpaid at July 12, 1954" of $76,712.52 (which would include the unpaid balance of the accounts taken as security), and deducting from it first the "contingent reserve of 20% of the unpaid accounts", or $15,342.50, and then deducting from that result the "reserve adjustment — net credit resulting from schedules of assignments credited collection reports, debits and credits, unpaid checks, checks on accounts and miscellaneous adjustment" of $19,579.31. Thus, since these security accounts were entered in the credit side of the reserve adjustment account that was deducted, the final result of $41,790.12 could not include them (post 11).

## QUESTIONS PRESENTED (Petition 2-4)

1. The principal question presented arises on the assertion of Petitioners that the decision of the Court of Appeals deprives them of the right of jury trial in violation of the

Seventh Amendment of the Constitution of the United States, by reason of its holding that Respondent was entitled to a directed verdict, except as to the amount of service charges and attorneys' fees. The basis for this holding is that there was not in the record, with the exception of the service charges, any substantial issue of fact as to Respondent's right to recover the cash advanced and expenses incurred as shown by Respondent's original ledger sheets, or its right to recover the uncontested amount of attorneys' fees due under the contract as found by the jury, and that, as to Petitioner Sorgel's defenses, there was either no substantial evidence to warrant the submission to the jury of issues with relation thereto, or else the findings of the jury thereon were legally immaterial. In other words, the decision of the Court of Appeals is **not based upon fact conclusions** of any kind but upon numerous well-supported conclusions of law. If this case raises a question under the Seventh Amendment, so does every case involving the direction of a verdict or a judgment notwithstanding the verdict **Galloway vs. United States**, 319 U.S. 372, 388-90, 63 S. Ct. 1077, 1086-90. (See post 13).

2. The answer to whether the Court of Appeals could reverse a judgment based upon a jury verdict and judgment for Petitioners and direct entry of a money judgment for Respondent by (a) resolving evidentiary conflicts against Petitioners, and (b) rejecting evidence presenting a jury question, lies in the fact that **the Court of Appeals did nothing of the kind**, as more fully shown later (post 13).

3. The Court of Appeals herein has not in any way departed from the accepted and usual judicial proceedings by (a) viewing the evidence against rather than in favor of Petitioners, (b) making fact findings of any kind, particularly none contrary to the evidence, (c) substituting its

for damages for those made by the jury, or (d) substituting its interpretation of technical accounting records and procedures for the testimony of record custodians and expert witnesses. (See post 18).

4. Neither the District Court nor the Court of Appeals erred in holding Petitioner Sorgel liable upon his guaranty of the corporation's contract where (a) all three guarantors were sued, but prior to trial two of them were dismissed with prejudice over the objection of the remaining guarantor, Sorgel, (b) the authority of the officers acting for the corporation rested upon the corporate resolution of the Board of Directors of Howard Corp. (R. I.170) (See post 25, 27)

5. The Court of Appeals could properly, after a jury verdict and judgment for Petitioners, both in the main action and on the counterclaim, reverse the judgment and direct entry of a money judgment for Respondent because there is no substantial evidentiary basis for the jury's verdict and the judgment entered thereon. (See post 28).

## REASONS FOR DENYING THE WRIT

### 1.

### PRACTICALLY THE SOLE ISSUE IN THIS CASE IS THE SUFFICIENCY OF THE EVIDENCE, AND A GRANTING OF THE WRIT WILL REQUIRE THAT THIS COURT REVIEW THE SIX VOLUMES OF THE RECORD IN ORDER TO EVALUATE SUCH EVIDENCE.

As shown by Mr. Justice Frankfurter's dissenting opinion in **Sentilles vs. Inter-Caribbean Shipping Corp.**, 361 U. S. 107, 80 S. Ct. 173, 177, "the practice of not taking cases turning solely on the evaluation of evidence has been con-

sistently adhered to, barring an occasional sport like **Dick vs. New York Life Insurance Co.**, 359 U.S. 437, 79 S. Ct. 921, except in the special class of cases arising under the Federal Employers' Liability Act, 45 U.S.C.A., Section 51 et seq. and its twin, the Jones Act, 46 U.S.C.A., Section 688." See also **Southern Power Co. vs. North Carolina Public Service Co.**, 363 U.S. 308, 44 S. Ct. 164.

2.

THE ISSUES BEFORE THIS COURT, AS PRESENTED BY THIS LARGE RECORD, WERE GIVEN A MOST METICULOUSLY CAREFUL AND PAINS-TAKING DETAILED CONSIDERATION BY THE COURT OF APPEALS, AND ITS CONCLUSIONS, BASED PARTLY UPON COMPLICATED PROBLEMS OF ACCOUNTING, ARE IN ALL RESPECTS CORRECT, 274 Fed. 2d 449, 277 Fed. 2d . (Petition 1a-42a).

The nearly 1500 pages of the record and more than 400 pages of briefs have now been increased by the additional proceedings in the Court of Appeals. The Court of Appeals says that they —

> "with the greatest difficulty have arrived at what we consider to be the grains of truth. They have been deeply hidden in much chaff." (Petition 35a).

3.

THERE IS NO FEDERAL QUESTION INVOLVED OR DECIDED IN THIS CASE, AND THE COURT OF APPEALS HAS NOT RENDERED A DECISION THEREIN IN CONFLICT WITH THIS COURT OR WITH ANOTHER COURT OF APPEALS.

The conflicts claimed (Petition 19-20, 28-9, 39, 42, 48-9, 50-1, 54-5, 59-60) do not exist, the cases cited not being in point (post 17, 24, 29).

4.

THE COURT OF APPEALS HAS NOT HEREIN SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

This Court in **U. S. vs. Carver**, 260 U.S. 482, 43 S. Ct. 181, said that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case."

5.

THERE ARE NO QUESTIONS INVOLVED IN THIS CASE, THE SETTLEMENT OF WHICH ARE OF IMPORTANCE TO THE PUBLIC, AS DISTINGUISHED FROM THAT OF THE PARTIES.

**Layne & Bowler Corp. vs. Western Well Works**, 261 U.S. 387, 43 S. Ct. 422; **Magnum Import Co. vs. Coty**, 262 U.S. 159, 43 S. Ct. 531; **Rice vs. Sioux City Memorial Park Cemetery, Inc.**, 349 U.S. 70, 74, 75, S. Ct. 614, 616.

With great ingenuity and industry, intense partisanship, much self-assurance and affrontery, and very little regard for exactness in the truth, Petitioners denounce in unmeasured terms the closely analytical and absolutely fair and, we believe, correct opinions of the Court of Appeals. They assume, without making any pretense of showing it, that this case is one of importance to this Court, and of equal importance to the public at large simply because it is one of importance to them.

6.

THIS COURT SHOULD LEAVE UNDISTURBED THE INTERPRETATIONS OF LOCAL (ILLINOIS) LAW.

**Spiegel's Estate vs. Commission of Internal Revenue**, 355 U.S. 701, 708, 69 S. Ct. 301, 304.

The Federal Court's jurisdiction herein is based upon diversity of citizenship and by the terms of the contract involved it is to be construed by the laws of Illinois where it was executed, and most of the questions involved are determinable under the laws of that state, notably the questions of alleged fraud (Petition 5a; post 12-3), the question of payment after cancellation of the contract through taking of additional accounts and returned merchandise (Petition 16a; post 22), and the questions of Sorgel's liability in spite of the dismissal of the other two joint and several guarantors (Petition 33d-34a; post 25), and in spite of the informality of the Howard Corp. resolution authorizing the contract (post 27).

The Illinois decisions cited in these several portions of the opinion below, as well as in our later argument, very clearly decide and control the questions of law at issue on these matters in this case.

## ARGUMENT

### CONCLUSIONS ON WHICH JUDGMENT WAS REVERSED ARE ENTIRELY CONSISTENT (Petition 11):

**1 (a)** The Court of Appeals does not hold that there was a fact issue as to the amount of accounts receivable Commercial Credit had actually "purchased" prior to the termination of the contract on September 25, 1953, and did not remand the case for the purpose of having the amount of those accounts determined. Upon the contrary, in its final conclusions, in the original opinion, the Court of Appeals very plainly says:

> "We conclude that such analysis, once made, shows that, without factual dispute, the principal sum of $41,790.12 was owed by Howard Corp. to Commer-

> cial Credit on July 12, 1954. We find no substantial issue drawn as to the debits or credits after that date except as to the computation of the service charges . . . We hold, therefore, that on the record before us there was no substantial issue of fact as to Appellant's right to recover the sum of $41,790.12, as principal amount due on July 12, etc." (Petition 35a).

It then remands the case for the determination of "the amount due as service charge".

This conclusion, although changed on Petitioners' Petition for Rehearing (Petition 37a-38a), was reinstated completely on Respondent's Petition for Rehearing (Petition 40a-42a).

Now the Court had already held that the service charges "should be figured on the average daily balance of accounts actually 'purchased', or on which Commercial Credit had actually advanced 80% of the face value", in accordance with the terms of the contract (Petition 32a-33a).

The only thing that this "average daily balance, etc." has to do with this principal sum of $41,790.12 is that, beginning on July 12, 1954, this sum is the "average daily balance", but before September 25, 1953, when the contract terminated, this "average daily balance", as shown by Commercial Credit ledger sheets (R. III, 649-63) might vary from day to day. That is doubtless the reason why the Court said that "we do not perceive that there can be an issue of fact as to the amount of this [service] charge", but, "in view of the complicated state of the record", nevertheless remanded for the determination of the service charge (Petition 35a).

Being wrong in their premise, Petitioners are wrong in their conclusion of a contradiction in the Court's opinion.

1 (b) In their attempt to stultify the Court of Appeals,

Petitioners (13) assert that though the Court had held that the $46,723.40 of accounts receivable accepted by Commercial Credit after August 26, 1953, were taken as security and not as payment (Petition 13a-20a), the Court's finding on Respondent's Petition for Rehearing (Petition 40a-42a) that the $9144.46 of these accounts taken by Commercial Credit after September 25, 1953, were included in the 20% and 30% credits on July 12, 1954, of $15,342.59 and $19,479.81, "unmistakably conflicts" with its first mentioned basic conclusion.

What the Court is talking about on rehearing relates to Plaintiff's Exhibit 15 (R. III, 675-6; Note 15, Petition 31), but what Petitioners fail to take into account is the fact that the balance unpaid of $46,723.40 on July 12, 1954, is included in the $76,712.52 (total assigned accounts receivable unpaid) as shown by that Exhibit, so that when you have deducted 20% of these accounts then unpaid and also deducted the reserve adjustment net credit thereon of 30%, you have by no means accepted this amount of these accounts as payment, for the credit offsets the debit, so far as this much of the account is concerned.

The claim of Petitioners that $7315.56 (80% of $9144.46, which is the part of the $46,723.40 that was assigned to Commercial Credit after September 25, 1953) was included in the $41,790.12 was the subject matter of the two per curiam opinions of the Court of Appeals on rehearings (Petition 36a-42a), and it was definitely held in the last of these opinions that such sum was not so included, either according to Plaintiff's Exhibit 15 or according to Commercial Credit's ledger sheets. This is supported by the direct testimony of Kratz (R. V, 1003), an examination of said Exhibit, Rossiter's explanation of it (it being sometimes referred to

as Exhibit B) (R. III. 669), the absence of any claim on the part of Petitioners' accountant witness, Montag, and, most conclusive of all; the fact that the daily credit balance of Howard on the books of Commercial Credit (R. III. 655-7) was increased during the period when these additional accounts were being assigned by the exact amount of the face of such accounts, $9144.46. (Petition 41a, bottom).

There is nothing wrong about the $15,342.59 and the $19,579.81 not equalling the total of $46,723.40 of accounts assigned after August 26, 1953, for the $15,342.59 is shown on this Exhibit 15 to be 20% of "unpaid accounts" as of July 12, 1954. Evidently some of these accounts had been paid in the interval of about a year.

Again, there is no reason why a deduction of the $46,723.40 of security accounts from the $76,712.52, total of assigned accounts receivable unpaid at July 12, 1954, as shown in this Exhibit 15, should equal $41,790.12, because though the latter amount is the unpaid balance of accounts assigned before August 26, 1953, and so included in the $76,712.52, the $46,723.40 is not the **unpaid** balance of accounts assigned thereafter, but the full amount of such accounts so assigned.

1 (c) The Court of Appeals made it perfectly plain that the service charges should not be based upon the accounts received as security, but only on the average daily balance of the accounts actually purchased or on which Commercial Credit had actually advanced 80% of the face value (Petition 33a).

2 (a) As already explained, there is no conflict in the idea that the contract was at once a loan contract and one for sale of accounts receivable (ante 9). The latter function is in effect a security for the purposes of

the former. It should be noted, however, that this was only one of a number of grounds on which the Court set aside the jury's findings on fraudulent misrepresentation (Petition 4a-6a). See, in addition to authority cited Petition 5a, **In re Baumgarth's Estate**, 163 NE 2d 201 (Ill. App.).

2 (b) The same thing is true about the similar holding of the Court with reference to Section Second (a) of the contract transferring full title to all accounts to Commercial Credit, though this again is only one of a number of grounds on which the Court held that neither the accounts nor the returned merchandise were taken in payment and not as security (Petition 13a-25a).

The findings of the Court that this was a loan contract for some purposes and a sales contract for other purposes were by no means irreconciable.

## THE COURT OF APPEALS DID NOT DEPRIVE PETITIONERS OF RIGHTS GUARANTEED BY THE SEVENTH AMENDMENT

(3) If the object of Petitioners (16) is to obscure the ultimate facts about the agreement of all accountants for both parties on the figure of $67,355.55 as the amount owed Commercial Credit on the termination of the contract on September 25, 1953, it could not have been better accomplished than to take this Court through the maze of evidential figures shown on page 17 of the Petition.

To clarify the matter: It is true that one basis of the decision of the Court of Appeals on the principal amount of $41,790.12 being due Respondent on July 12, 1954, is the qualified agreement of Petitioners' accountant witness, Montag, to the fact that $67,355.55 was due Commercial Credit on September 25, 1953 (Petition 8a-9a, 20a, 35a), the

other basis being Respondent's ledger sheets, which are the only original documentary evidence about the matter.

On cross examination of Montag (Note 11, Petition 20a-21a), the following appears:

"Q. In other words, Mr. Montag, there is no difference between you and Mr. Rossiter's figures. The only difference is in the way you treated them.

"A. Application, yes, sir.

"Q. The application of figures. In other words, there is no disagreement as to the basic books, but merely as to the method of applying.

"A. That is correct." (R. V, 1165)

In the light of this, it would seem amazing if the ledger sheets, their custodian, Kratz, and the accountants Rossiter and Montag were in the state of complete disagreement indicated now by Petitioners (17).

There is no such disagreement among them on the ultimate facts.

The Commercial Credit's ledger sheets (Plaintiff's Exhibit 14, R. III, 649-63), sometimes called its loan control card (R. III, 647), for the Howard Corp. account, as kept under the direction of Mr. Kratz, show, as also concretely testified to by Mr. Kratz, that the amount due Appellant as of September 25, 1953, was $67,355.55 (R. V, 1031).

This figure is borne out by the testimony of Lewis E. Rossiter, an independent certified public accountant from Chicago, and he consolidated his findings, from an examination of Appellant's records, into Plaintiff's Exhibit 15 (R. III, 675-6). His figure of $68,128.53 as due Appellant on September 25, 1953, includes the September service charges

of $772.98, thus accounting for the difference as against $67,355.55 (R. III, 701).

Mr. Montag, the accountant witness for Petitioners, had the use of all the books and records of Howard Corp., as well as Respondent's ledger sheets (R. V. 1194-10), and he reconciled figures with Appellant only as of September 25, 1953, when the contract terminated, and he agreed with the figure of $67,355.55 as due Commercial Credit at that time, except only as it might be altered by several credits to Howard Corp., which are claimed by Mr. Montag and denied in application by the Court (Petition 8a-20a; R. V. 1163-5).

The unpaid portion of 80% of the $46,723.40 ($37,378.71) of accounts taken by Commercial Credit as security after August 26, 1953, is not included in the $41,790.12 principal sum due Respondent (as claimed by Petitioners 17-18), although Mr. Montag undertook to charge this sum as a debit against Commercial Credit, his theory in doing so being fully discussed by the Court of Appeals with a full statement of the facts (Petition 15a-19a), to which we add these record references: R. V. 1171, 1155, 1156, 1193, 1197.

Thus is dispelled, we believe, the fiction that Petitioners were deprived of their constitutional right to jury trial by reason of the Court of Appeals having carefully analyzed the issues, as presented in this large and confusing record, and excluded the reasonable possibility of there being any ultimate issues of fact for a jury.

Petitioners (18-19) attempt to point up reasons against the acceptance of Montag's definite admission on cross examination of his reconcilement with the figure of $67,355.55 as of September 25, 1953, as follows:

**First:** There is no discrepancy between the pleadings of the ultimate amount due (R. I. 15), the Court's statement

of this (Petition 1a), and the holding of the Court about how the $67,355.55 is arrived at (Petition 20a).

**Second:** It is not true that there is no factual basis for the above noted cross examination of Montag in that Rossiter testified to the figure of $68,128.53 (R. III, 668-9) rather than $67,355.55, for Rossiter in the same connection makes it plain that the difference is accounted for by his inclusion of the September service charges of $772.98 (R. III, 701).

**Third:** It is said that "the figures used by Montag in the reconcilement were for the purpose of such hypothesis only" (Petition 19), but we assume that the truth is the same for all purposes.

**Fourth:** Although Montag explained that he did not agree with the debit of the $13,098.94 NSF check against Howard Corp. and Petitioners (20) accuse the Court of Appeals of "unfairly slanted findings" about the matter, we would think that only the most biased and partisan sort of mind could disagree with the Court about this matter.

The Court discusses this item at some length (Petition 9a-13a). The question is whether the chargeback was warranted by a previous credit, the previous credit having been in a larger sum that included the $13,098.94 check, and the Court accepts this showing on Commercial Credit's ledger sheets upon the basis that these entries are presumed to be correct in the absence of any impeachment or contradiction, and that the testimony of Bob Howard might have been available to Petitioners to contradict if this original credit item had been incorrect (Petition 12a). More than this, the books and records of Howard Corporation, which Montag says he had in his possession at the time of trial (R. V, 1104-5), should have been available to contradict if there had been any error. We therefore suggest that it

is utterly unfair for Petitioners (25) to charge that the Court of Appeals "re-weighed the testimony and substituted its interpretation".

In order to avoid the effect of their own accountant's testimony, Petitioners (20) cite **Liberty Mutual Insurance Co. vs. Thompson**, 171 Fed 2d 723 (CA—5th), and **Fort Worth & Denver Ry. Co. vs. Janski**, 223 Fed. 2d 704 (CA—5th), to the effect that his testimony need not be credited in its entirety and that as the opinion of an expert it was not binding upon Petitioners. The cases cited relate to medical diagnosis and prognosis, something considerably less exact than accountancy.

4. As previously shown by us (ante 16), the $13,093.94 NSF check was a proper debit item and the record references given by Petitioners (11, 25) to the statement that Rossiter included 80% or $32,500.53 of the Skillern account and $1,409.13 of the Ward Drug Account in the principal sum of $41,790.12, do not support the statement. When we look to Plaintiff's Exhibit 22 (R. V, 1041-9) and the identical Defendants' Exhibit 13 (R. III, 615-9) and Defendants' Exhibit 13 B (R. V, 1251-62), especially looking at the latter, which is alphabetically arranged, we find that the invoices to Skillern covering the largest amounts were made after August 26, 1953. Thus, an item of August 27 of $1550.40 marked "Ret Mdse.", an item of September 1 of $10,828.80, and an item of September 2 of $4492.80, as well as many smaller items, appear to have fallen in the security category, being accounts taken by Commercial Credit after August 26, 1953, and therefore could not have been included in the balance of $41,790.12 of acounts assigned prior to the cancellation of the contract on August 26, 1953.

As shown above, it appears that, after Petitioners had introduced in evidence the Howard Corp. account against

Skillern, Commercial Credit placed in evidence an identical account with Skillern, showing the same amount of $884.60 due.

Thus, it is claimed that Respondent's Exhibit 22 was a judicial admission impeaching its ledger sheets. It is shown, however, in the testimony of Kratz, appearing in Note 13, page 27 of the Petition, that the statement of the Skillern account furnished by Howard Corp. and sent to Skillern demanding only $884.60 about February 15, 1954, was used rather than what their books showed because they did not know the condition of the Skillern account, and in this connection it is noted that between August 25, 1953, and February 11, 1954, more than $28,000 is shown to have been credited to this account (R. III, 619).

Under these circumstances, the holding of the Commission of Appeals of Texas in **Hillman vs. Hillman,** 157 SW 2d 143, 145, an opinion adopted by our Supreme Court, would seem to be applicable. In that case, complaint was made that the plaintiff was allowed to offer an auditor's report in evidence, and then to offer testimony contradictory of certain items in it, and the Court in overruling this contention quoted R.C.L., now 20 Am. Jur. 771, as follows:

> "'And in analogy to the rule that while a party may not impeach his witness generally, he may prove the truth of particular facts in direct contradiction of the testimony of such witness, the authorities hold that a party introducing documentary evidence may disprove facts stated therein.'".

See also **Masterson vs. Bouldin,** 151 SW 2d 301, 303 (Tex. CCA) (E.R.); **Brumit vs. Cokins,** 281 SW 2d 154, 156 (Tex CCA) (R.N.R.E.); **Hawkins vs. Maxfield,** 318 SW 2d 492, 495 (Tex. CCA); **Long Beach Brick Co. vs. De Dodson,** 285 Pac. 382 (D.C. App.—Calif., rehearing denied by Supreme Court).

Here, too, as in **Snell Isle, Inc. vs. Commissioner** 90 Fed. 2d 461, 482 (CCA—5th), "it was unnecessary to limit the purpose for which they [the documents] were introduced by any statement of counsel."

Petitioners (30) complain that Respondent did not sue on some accounts within the limitation period, but Kratz explains that "if the account [debtor] had paid money to Howard and we didn't get it, [or] if he had returned merchandise to Howard, we couldn't collect those accounts" (R. V. 1006).

5. Petitioners (30-2) assert error in the computation of interest on "the **$19,579.81 it had collected** and credited on July 12, 1954", referring in this connection to Plaintiff's Exhibit 15, which is set out in their appended Note 15.

As shown in Plaintiff's Exhibit 15, this $19,579.81 was not simply a collection item, and the question put to the witnesses was the matter of interest or service charges being based upon the entire $76,712.52 shown in said Exhibit to be the "total assigned accounts receivable unpaid." The Court of Appeals (Petition 32a-33a) held that though the service charges were to be computed on the average daily balance of accounts actually purchased, they were erroneously not so computed by Respondent, and the matter of determination of the service charges on the basis of this standard was left to the trial court on the remand of the case (Petition 35a). In other words, the Court of Appeals held that the service charges could not be computed upon the basis of the accounts not purchased but taken as security. How the frank admissions of their erroneous interpretation of the contract by Respondent's officers should go to the credibility of the witnesses we are at a loss to understand.

The second debit item of which Petitioners (32-3) complain relates to expenses amounting to $170.25, for which

Respondent had no proof except the showing of its ledger sheets, and other expenses in the sum of $2263.61, for which no proof was made as to the necessity therefor and reasonableness thereof.

We do not find that the Court of Appeals recognized any failure of proof with reference to any of these expenses. The statement made by Petitioners (33) that "it was stipulated that **only** $10,730.02 of the expenses were necessary and reasonable" is misleading, to say the least. Actually, all of the expenses incurred up to the date of the agreement, April 9, 1956, by both parties were stipulated to have been reasonable and necessary and to have been expended in the prosecution of this suit, and in the case of Respondent they are shown to have amounted to $10,730.02 (R. IV, 767-70).

All of the expenses were on the ledger sheets up to October 23, 1956, when the ledger sheets terminated (R. III, 661-3, 765-6). Most of these expenses, including the greater part of the $1867.69 expenses incurred after the termination of the ledger sheets, were substantiated by vouchers (R. IV, 772-7). None of the expenses were in any wise questioned by Petitioners, who offered no evidence with respect thereto. Thus they all stand completely undisputed in nature and amount.

In this connection, in **Williams vs. National Surety Corp.**, 257 Fed. 2d 770, 776-7 (CA—5th), it was said with reference to permanent records of payrolls, vouchers, invoices and data supporting expenditures in a very large sum on a construction job, and therefore admissible under 28 U.S.C.A., Section 1732 (Petition 11a-12a):

> "Actually, the objection of W. & B. comes down to the assertion that . . . this was not sufficient evidence to establish that the items which the exhibits disclosed were expended were reasonably, necessarily

and actually spent by Ball because of W & B's default. As such, that is but another facet of the basic complaint on the sufficiency of the evidence which we have already held met the legal test."

We have already fully discussed the third debit-item complained of by Petitioners (33) and their claim that 80% ($7315.77) of the $9144.46 of accounts receivable taken by Commercial Credit as security after September 25, 1953, was included in the $41,790.12 principal sum due on July 12, 1954. (ante 11). And, in this connection, it does not appear that the court ignored the interpretation put upon the Commercial Credit records by Mr. Rossiter or by Mr. Kratz.

Defendants' Exhibit B (R. V. 1251-62) indicates that this $9144.46 was included in the $76,712.52 "total assigned accounts unpaid at July 12, 1954", but Plaintiff's Exhibit 15 (Note 15, Petition 31) shows that this 80% of such accounts, as well as the 20% thereof, were eliminated before the remainder of $41,790.12 was reached.

**6 (a).** What has just been said is applicable again to the contentions made by Petitioners before in this connection (36-8). "Book entries are either correct or incorrect", and these are taken by the Court as correct because there is not the least reasonable intimation in the evidence of their being incorrect.

**6 (b).** In fairness to Mr. Kratz, his explanation about not remembering in the former trial the figure of $41,790.12 mentioned in the complaint is that the figure was the result of several deductions, it being included in the over-all figure of $76,712.52 of which he was mindful (R. V. 1013-14).

**6 (c).** (Petition 40-42) Neither Rogers nor Kratz admitted that the latter swore falsely to defendants' request for admissions. Actually what Rogers said was that they got a little confused on these things and that he knew they sent a notice to the guarantors in October (R. III, 454-5). This was not an unnatural confusion, since no demand for repurchase by the guarantors was required under the guaranty (R. I, 138). These things illustrate Petitioners' method of probing into collateral and immaterial matters.

Book entries, though far more reliable than memory or opinions, are not, of course, conclusive, when there is contradictory or impeaching evidence, but there was none such here. As said in the opinion of the Court of Appeals, "the appellant made out its prima facie case by introducing its original ledger sheets" (Petition 7a). In **Hyde vs. Claude Neon Federal Co.**, 157 SW 2d 952, 954 (Tex. CCA), it is said with respect to a ledger sheet "that it constituted prima facie evidence of performance by the plaintiff and, there being no evidence to the contrary, was sufficient."

## THERE IS NO DEPARTURE OF THE COURT OF APPEALS FROM THE ACCEPTED AND USUAL JUDICIAL PROCEEDINGS.

**7 and 8.** Petitioners (42-9), by their counterclaim, sought to recover **for themselves** (the judgment of the trial court so awarded it, R. I, 98) the value of returned merchandise and accounts taken by Respondent as security after August 26, 1953, on the theory that there was testimony to support the jury's findings that these accounts and returned merchandise were accepted by Commercial Credit in payment, and the further theory that Commercial Credit exercised its election under Section Second (1) of the contract to accept and apply such merchandise and accounts

as payment (Petition 46a-47a). They cite in Notes 18, 19, 20 and 21 certain testimony of Rossiter, Kratz and Bracken and the original suggestion to the Customer that Commercial Credit was buying accounts. Clearly as to the last it is a non sequitur that these accounts were received by Commercial Credit as payment.

Rossiter actually testified that the accounts assigned to Commercial Credit after August 26, 1953, had to be credited on the books to Howard in some manner, but that there is a difference between a credit for cash and a credit for account as given in the reserve adjustment account (R. III, 736-7).

Both Kratz and Bracken very definitely testified time and again that neither the returned merchandise nor the accounts taken after August 26, 1953, were accepted as payment, but simply as security (R. IV, 879, 882, 883; R. II, 267, 337, 338-9, 342) and the same thing is borne out by the testimony of Rogers, who was head of the Chicago office of Commercial Credit (R. II, 410, 411, 447, III, 527, 630-1, 635), and the testimony of Weber (R. II, 349). **"No witness testified to the contrary"** (Petition 13a).

As noted, too, in the Court's opinion (Petition 15a), neither Bob Howard nor any of his employees, which included Edward L. Foster, the husband of Petitioner Dorothy L. Foster, testified to the contrary, nor did Petitioners' accountant, Mr. Montag, claim that the books and records of Howard Corp. showed payment by acceptance of these additional accounts receivable or merchandise in payment, although Mr. Montag says that he had possession of these books and records at the time of trial (R. V, 1104-5).

This subject is discussed at length in the opinion of the Court of Appeals (Petition 13a-25a), from which it appears (Petition 16a, 22a-23a) that there was no evidence whatever

of an agreement being had between Howard Corp. and Commercial Credit to receive either the returned merchandise or the accounts as payment, and that, under the decisions of the Illinois courts, such an agreement was essential.

In this connection, it was held by this Court in **United States vs. Isthmian Steamship Co.**, 359 U.S. 314, 318-19, 79 S. Ct. 857, 860, that payment connotes tender by the debtor with the intention to satisfy the debt coupled with its acceptance as satisfaction by the creditor.

The authorities cited by Petitioners (48-9) of course lay down the correct general rule on a different state of facts, and are therefore completely inapplicable. For instance, the Court of Appeals was plainly correct in its conclusion that there was no question involved of the credibility of witnesses or the impeachment of Commercial Credit's books (Petition 7a-13a), whereas in **Hedger vs. Reynolds**, 216 Fed. 2d 202 (CA—2nd), the decision turned largely upon the credibility of witnesses.

This Court, in **Chesapeake & Ohio RR. Co. vs. Martin**, 283 U.S. 209, 218, said:

> "Where, however, the evidence of a party to an action is not contradicted by direct evidence, nor by any legitimate inference from the evidence, and it is not opposed to the probabilities, nor, in its nature, surprising or suspicious, there is no reason for denying to it conclusiveness."

In addition to all else, a matter not mentioned by the Court of Appeals, all of the members of Respondent's credit committee testified that in making this loan to Howard Corp., action was predicated on Mr. Sorgel's guaranty (R. II 282, 407, 423, 441; I. 210; V. 1029-30). This was indeed

confirmed by Petitioner Sorgel as being the reason why his guaranty was required. (R. V. 1203). Under these circumstances it is completely incredible that Respondent, with a good and sufficient guaranty, after cancelling the contract on account of insecurity (R II 260-1) should have taken returned merchandise and accounts receivable, all at invoiced prices, in full payment. **Weger vs. Robinson Nash Motor Co.**, 197 NE 7, 11 (Ill. Sup.); **Spitz vs. Morse**, 72 Atl. 178 (Maine).

## 9. PETITIONER SORGEL LIABLE IN SPITE OF DISMISSAL OF OTHER TWO GUARANTORS

Although the guaranty was joint and several, Petitioner Sorgel claims that both the District Court and the Court of Appeals erred in holding him liable after the dismissal of the other two guarantors, Robert Howard and Dorothy L. Foster.

Respondent's motion for dismissal of these two guarantors stated "as grounds for dismissal of Mrs. Foster that it was believed that her plea of coverture was well taken, and as grounds for dismissal of Howard that he had never been served with citation, his whereabouts was unknown, and he was believed to be insolvent" (R. I. 2-3).

Mrs. Foster testified that she had lived in San Antonio, Texas, for nine years past as the wife of Edward L. Foster, by whom she was not joined in her signature on the guaranty, although she signed the instrument in San Antonio, Texas, where she was domiciled, and that she set up her coverture as a defense and was dismissed from the case (R. I. 138; R. V. 1094-5, 1098-9).

Petitioners rely upon **Rice vs. Webster**, 18 Ill. 331, **Clark vs. Mallory**, 56 NE 1099, and **United States vs. Wainer**, 211 Fed. 2d 669 (CA—7th).

The **Rice** case is indicated in the **Wainer** opinion, at page 673, to have been overruled by **Parmelee vs. Lawrence**, 44 Ill. 405, and the **Wainer** case itself relates to the compromise of a government claim and the release of one of two persons jointly and severally liable thereon. It completely distinguishes our case in the following language from page 672 of the opinion:

> "It is true that remedies against each of several debtors may be pursued where the debt is joint and several."

The **Clark** case is also an instance of a release, and this time of one of two **joint** obligors, reciting that certain things were received "in full settlement of all debts and demands of every name and nature", and was accompanied by a surrender of the notes representing the indebtedness.

**National Surety Co. vs. United Brick & Tile Co.**, 71 SW 2d 937, 940 (Tex. CCA), and **George Scalfi & Co. vs. State**, 73 SW 441, would appear to support the right of Respondent to dismiss as against Bob Howard and proceed to judgment against Sorgel.

The cases of **Hamer vs. Pennell**, 86 Fed 2d 227, 229 (CA—5th), **Massey vs. Farmers' National Bank**, 104 Ill. 327, 331, **Gage vs. Mechanics' National Bank**, 79 Ill 62, and **Munoz vs. Brassel**, 104 SW 417, 418-9 (Tex CCA), would appear to amply support the right to dismiss as to Mrs. Foster on account of the defense personal to her and proceed against the other guarantor. See also opinion herein (Petition 33a-34a); **Lipe vs. Webster**, 278 SW 246 (Tex. CCA); and **Tinkham vs. Wright**, 163 SW 615, 619 (Tex. CCA)

As an exception to the general rule on conflict of laws: the law of the domicile prevails over all others with respect

to the protection of the married woman domiciled in Texas. **Union Trust Co. vs. Grossman**, 245 U S 412, 62 L. Ed. 368, 38 S. Ct. 147; **King vs. Bruce**, 201 SW 2d 303, 309 (Tex. Sup.); **Taylor vs. Leonard**, 275 SW 134, 135 (Tex. Civ. App.); **Bramwell vs. Conquest**, 2 SW 2d 995, 996 (Tex. App.)

Article 4623 of the Texas Statutes, until 1957, provided in part as follows:

> "The wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract."

## 10. PETITIONER SORGEL IS LIABLE IN SPITE OF INFORMALITY OF HOWARD CORPORATION RESOLUTION

The District Court and the Court of Civil Appeals were unquestionably right in not releasing Sorgel on this tenuous theory.

The obvious reason why the Court of Appeals did not specifically overrule this contention was that it said (Petition 5a) "this contract was a sale of accounts receivable," although "this contract was a loan contract" (Petition, Note 3a) — a thing manifest upon the face of the contract itself (Petition 45a); thus rendering it immaterial that the resolution of the corporate directors authorized a sale of accounts rather than a loan contract.

Furthermore, having, as shown in this resolution (R. I, 170), "read and examined" the contract, the directors must be presumed to know that under the law of Illinois it was a loan contract, as well, incidentally, as a sales contract. **Reighley vs. Continental Bank & Trust Co.**, 61 NE 2d 29 (Ill. Sup.).

There is also an estoppel against these director-stockholders to claim that the contract they executed for the corporation was invalid after having enjoyed the benefits of it. **Chicago Title & Trust Co. vs. Cohen,** 1 NE 2d 717 (Ill. Sup.); 19 C.J.S. 472

Finally, Sorgel as an absolute or unconditional guarantor, with independent consideration, consisting of his stock dividends in Howard Corp. **(Motor & Industrial Accident Board vs. Hughes,** 302 SW 2d 386, 391 [Tex Sup.]), was bound, regardless of the invalidity of the principal contract. **Holm vs. Jamieson,** 50 NE 702 (Ill. Sup.). In fact, the guaranty itself provides: "This guaranty shall not be affected, impaired, or diminished because any accounts, documents, invoices, or other paper writings are invalid, etc" (R. I, 138).

## THE COURT OF APPEALS HAD THE RIGHT TO DIRECT ENTRY OF JUDGMENT FOR RESPONDENT

**11.** (Petition 55-6) This is in the nature of a rehash of things previously discussed with a lot of name calling.

**12.** (Petition 57-9) As for the apparent accusation that Commercial Credit stole $25,794.44 of stored merchandise, it is born of desperation and utterly baseless (a) because both the invoiced value of $68,445.56 of returned merchandise and the $42,013.93 of merchandise testified by Petitioners' accountant, Mr. Montag, to be left on hand, represent, not the market value or the real value, but the amount for which Howard Corp. sold it for in 1953 (R. V, 1130-1), (b) because dissipation or conversion of the security merchandise is not alleged and the only pleading of Petitioners about negligence and the only related finding of

the jury (R. I. 30, 52-3) concern the diligence of Respondent in selling the merchandise, and (c) because the creditor is not responsible to the unconditional guarantor for loss in the security taken from the principal after cancellation of the contract. **Beebe vs. Kirkpatrick,** 152 NE 539 (Ill. Sup.); **J. I. Case Co. vs. Laubhan,** 77 SW 2d 578 (Tex. CCA); **Joe Heaston Tractor & Implement Co. vs. Securities Acceptance Corp.,** 243 Fed. 2d 196 (CA—10th).

**SUMMARY** (Petition 59-60)

Nothing new is presented in this connection by Petitioners.

**Sentilles vs. Inter-Caribbean Shipping Corp.,** 361 U.S. 107, 80 S. Ct. 173, and **Revlon, Inc., vs. Buchanan,** 271 Fed. 2d 795 (CA—5th), cited by Petitioners (59-60), are both personal injury cases, involving facts and circumstances completely dissimilar to those here involved. The **Sentilles** case is a decision under the Jones Act, 46 U.S.C.A., Section 688.

The peculiarity of this case is that Respondent made its prima facie case, after offering the contract and guaranty (R. I. 136-8), by introducing its original ledger sheets (Petition 7a; R. III, 652-62), thereby putting upon Petitioners the burden of proof on their various and sundry defenses, as well as their counterclaim. Thus, instead of the cases cited by Petitioners, this Court's opinion in **Pennsylvania RR Co. vs. Chamberlain,** 288 U.S. 333, 53 S. Ct. 391, 393, importantly applies, it being there said:

> "We therefore have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event neither of them being established, judgment, as a matter of law, must go against the party upon whom

rests the necessity of sustaining one of these inferences as against the other."

Under the federal rule and the Wisconsin rule a 'scintilla' of evidence is not sufficient to require the submission of an issue to a jury, **Reitan vs. Travellers Indemnity Co.**, 267 Fed. 2d 66, 68 (CA—7th), and the same rule prevails in Texas, **Rounsaville vs. Bullard**, 155 Tex. 260, 276 SW 2d 791, 794.

Practically the sole issue here is the sufficiency of the evidence to support the verdict of the jury, and the thoroughness with which this big record has been reviewed and analyzed in the lengthy opinion of the Court of Appeals should assure this Court of the ultimate justice of its conclusions.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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## PROOF OF SERVICE

I, Charles W. Trueheart, one of the Attorneys for Commercial Credit Corporation, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that a copy of the foregoing Brief for Respondent in Opposition, in the above captioned matter, was served on William J. Sorgel, Executor of the Estate of William R. Sorgel, Deceased, and Dorothy L. Foster, Petitioners herein, by leaving a copy of same at the office of Mr. Leon P. Howell, 1412 Alamo National Building, San Antonio, Texas, one of the Attorneys of Record for said Petitioners, on the day of June, 1960.

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